

## COMMENT

### Home Sweet Copyright

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#### INTRODUCTION

The Architectural Works Copyright Protection Act<sup>1</sup> (AWCPA) conferred copyright protection on architectural works for the first time in American legal history as part of an effort to bring the United States into compliance with the Berne Convention, the international copyright treaty.<sup>2</sup> While other countries had long included architecture in the list of works eligible for copyright,<sup>3</sup> American courts have struggled with applying the AWCPA and incorporating architecture into the existing landscape of copyright law. While courts have generally extended protection to large-scale architectural projects, such as skyscrapers<sup>4</sup> and entire mixed-use developments,<sup>5</sup> they have so far afforded little protection to smaller works. In particular, private homes that fit into an established architectural style have often received only thin protection.<sup>6</sup>

Based on the underlying principles of copyright, however, this state of affairs is paradoxical. Novelists, who invest a great deal of time in writing a book and then create additional copies of the same work at little or no cost, are the prototypical copyright

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<sup>1</sup> Pub L No 101-650, 104 Stat 5133 (1990), codified as amended in various sections of Title 17.

<sup>2</sup> See Berne Convention for the Protection of Literary and Artistic Works Art 2(1) (WIPO 1979), archived at <http://perma.cc/ML7X-GPGJ>.

<sup>3</sup> See Natalie Wargo, Note, *Copyright Protection for Architecture and the Berne Convention*, 65 NYU L Rev 403, 417–18 (1990).

<sup>4</sup> See, for example, *Shine v Childs*, 382 F Supp 2d 602, 609 (SDNY 2005).

<sup>5</sup> See, for example, *Peter F. Gaito Architecture, LLC v Simone Development Corp*, 602 F3d 57, 60, 68–69 (2d Cir 2010) (holding that the defendants had not infringed on the plaintiffs' design of a mixed-use development but noting that the plaintiffs' design was protectable through copyright).

<sup>6</sup> See, for example, *Interwest Construction, Inc v Canterbury Estate Homes, Inc*, 554 F3d 914, 919–21 (11th Cir 2008).

holders—incurring a significant up-front cost of creation and then a low marginal cost for subsequent copies. For the novelist, having a limited monopoly on that book is crucial; if other producers, who did not incur the initial cost of creation, could also sell copies, they could make a profit by charging only slightly above the marginal cost of producing each copy, thus undercutting the author's price and preventing her from recovering her initial investment. Because the author could never recoup her initial cost of production, her incentive to create would be eliminated.

When it comes to building private homes, many architects create predesigned plans, which are then sold to numerous customers. As a result, each customer pays only a fraction of the cost of designing a fully custom home, and the architect is still able to make a profit. This market structure, however, is vulnerable to copyright infringement. If another home-building company can copy the architect's design, that company can sell the design for much less, having avoided the initial expense of creation. The original architect will thus be unable to recoup that cost, and this market, which allows many middle-class families to build homes according to their own specifications, will be undermined. The market for smaller architectural projects therefore requires copyright protection. Some courts, however, have recently failed to accord these projects the appropriate protection; this treatment, if it continues and becomes widespread, could jeopardize the market for predesigned homes.

On the other hand, the designer of a large architectural work typically expects to sell it only once. After that project has been completed, the architect has been paid in full, recouping all of the cost of production.<sup>7</sup> While later imitations might have some reputational impact, architects can profit from their larger projects without ever having to sell more than one copy, so they need not subsequently compete with other producers in order to recoup their initial costs of creation. In this sense, architects have an incentive to create large-scale projects even without copyright protection. Despite this lesser need for protection, courts seem most comfortable with finding infringement in cases that involve these large-scale projects.

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<sup>7</sup> See Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out "Total Concept and Feel"*, 101 Nw U L Rev 1851, 1855–57 (2007).

Although many designs are of existing architectural styles and thus are not wholly new, existing copyright doctrine already holds the tools to allow courts to evaluate two designs' similarity in this context. When analyzing literary works, courts use the doctrine of *scènes à faire* in order to sort out trivial similarities—those elements that indicate only that two works belong to the same genre and that are not accorded copyright protection—from significant similarities that establish infringement.<sup>8</sup>

“[S]cène à faire,” in its original theatrical sense, denotes a scene that is “inevitable and indispensable,” often so central to the play's plot that, without it, there would be no play.<sup>9</sup> In the copyright context, the term describes a set of elements so fundamental to a group of works that a finding of infringement cannot be based on them.<sup>10</sup> As Judge Richard Posner put it, *scènes à faire* “are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”<sup>11</sup> Thus, the traits that define a work's genre cannot also define the scope of its copyright protection. Otherwise, the author of a single copyrighted work could block any work in the same genre. This Comment argues that, by treating architectural styles as comparable to literary genres and the styles' characteristic features as analogous to *scènes à faire*, courts can allow continued creativity within the industry without impeding future architects' ability to create their own designs.

This traditional *scènes à faire* inquiry can be adapted to the architectural context with relative ease. The home-planning industry has a well-established system for classifying alterations to existing designs.<sup>12</sup> Courts can employ these existing industry classifications, which separate minor design modifications from more significant ones, in determining whether the similarities between the plaintiff's and defendant's designs are mere *scènes à faire* that represent a common genre or instead constitute an

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<sup>8</sup> See, for example, *Bucklew v Hawkins, Ash, Baptie & Co, LLP*, 329 F3d 923, 929 (7th Cir 2003) (noting the similarities between *You've Got Mail* and *The Shop around the Corner* as examples of *scènes à faire*); *Reed-Union Corp v Turtle Wax, Inc*, 77 F3d 909, 914 (7th Cir 1996) (discussing similarities among works inspired by William Shakespeare, including Vincenzo Bellini's *I Capuleti e i Montecchi* and Leonard Bernstein's *West Side Story*).

<sup>9</sup> R.W. Burchfield, ed, 3 *A Supplement to the Oxford English Dictionary* 1520 (Clarendon 1982).

<sup>10</sup> See *Bucklew*, 329 F3d at 929.

<sup>11</sup> *Id.*

<sup>12</sup> See note 225 and accompanying text.

illegal effort to capitalize on the original artistic contribution of another.

Part I of this Comment discusses the history and intent behind the legislation that extended copyright protection to architecture. Part II describes the existing ways courts have assessed substantial similarity in the context of architecture and examines what these various modes of analysis might mean, in practice, for architects seeking to protect their work. Part III proposes a new mode of analysis, one that relies on the existing doctrine of *scènes à faire* to provide works of architecture with the protection afforded by statute while still allowing future architects to explore existing ideas and concepts in creating their own work.

### I. THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT

Until the 1990 passage of the AWCPA, courts had not encountered the problems of applying traditional copyright law to architectural works. Part I.A explores the existing foundation of copyright law and how courts have assessed infringement in other realms. Part I.B describes the limited protection architectural works occasionally received before the AWCPA, a history that helps explain the overly formalist approach some courts continue to take despite the statutory change. Part I.C introduces the text of the AWCPA itself and the direction this statute provides for courts struggling to apply old law to a new field.

#### A. The Background of Copyright Law

The Copyright Clause of the Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>13</sup> This clause has been interpreted to authorize both the copyright system and the patent system, directing the copyright system to promote the “progress of science” by providing authors with limited monopolies over their “writings.”<sup>14</sup>

Under this constitutional authority, the Copyright Act of 1976<sup>15</sup> describes the specific contours of these monopoly

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<sup>13</sup> US Const Art I, § 8, cl 8.

<sup>14</sup> See *Graham v John Deere Co of Kansas City*, 383 US 1, 5 (1966) (ascribing the federal power to regulate patents to Article I, § 8, cl 8 of the Constitution); *Feist Publications, Inc v Rural Telephone Service Co*, 499 US 340, 346 (1991) (“The source of Congress’ power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution.”).

<sup>15</sup> Pub L No 94-553, 90 Stat 2541, codified as amended in various sections of Title 17.

rights.<sup>16</sup> Under the Act, copyright protection extends to “original works of authorship fixed in any tangible medium of expression,” provided that they fall into one of the listed categories (and not into one of the listed exclusions).<sup>17</sup> This copyright then provides the owner with a number of exclusive rights, including the rights to reproduce copies of the work, to create derivative works, and to distribute copies of the work.<sup>18</sup>

The owner of a valid copyright can sue any party that infringes on these exclusive rights. In order to prove infringement, a copyright owner must first prove that the defendant actually copied the plaintiff’s work.<sup>19</sup> “[A]ctual copying” can be shown either directly or indirectly, the latter through evidence that the defendant had access to the plaintiff’s work and that the defendant’s work is similar to the plaintiff’s.<sup>20</sup> Once the plaintiff proves actual copying, however, she must still prove that the defendant’s copying was wrongful—the two works must share some “substantial similarity” with respect to the protectable material in the plaintiff’s work.<sup>21</sup> In other words, if the defendant copied only the unoriginal elements of the plaintiff’s design, then the defendant will not be liable. Different circuits use different tests to analyze substantial similarity, and the inquiry also varies depending on the nature of the works at issue. In the end, however,

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<sup>16</sup> Copyright Act of 1976 § 106, 90 Stat at 2546, codified as amended at 17 USC § 106.

<sup>17</sup> Copyright Act of 1976 § 102, 90 Stat at 2544, codified as amended at 17 USC § 102. Other than architectural works, the current protected categories are “literary works”; “musical works”; “dramatic works”; “pantomimes and choreographic works”; “pictorial, graphic, and sculptural works” (sometimes affectionately called “PGS” by copyright scholars); “motion pictures and other audiovisual works”; and “sound recordings.” 17 USC § 102.

<sup>18</sup> Section 106 lists the rights that belong exclusively to the author of a copyrighted work. The author alone—and her licensees—may reproduce copies of the work, create derivative works, distribute copies to the public, and, in the case of certain kinds of works, perform or display the work publicly. 17 USC § 106. When it comes to architectural rights, however, the author does *not* have the exclusive right either to create pictorial representations of the building or to alter or destroy the building. 17 USC § 120. This ensures that the public may take photos of buildings without infringing (provided that the building is visible from a public place) and that the owner of the structure itself, who may not own the copyright, can repair, alter, or destroy her own property. See 17 USC § 120.

<sup>19</sup> See *Laureyssens v Idea Group, Inc*, 964 F2d 131, 139–40 (2d Cir 1992).

<sup>20</sup> See *Shine v Childs*, 382 F Supp 2d 602, 611 (SDNY 2005) (“[U]nless the rare situation exists where plaintiff has direct proof that defendants copied his work, plaintiff may prove actual copying by showing that defendants had access to his copyrighted works, and that similarities that suggest copying exist.”). See also *Bright Tunes Music Corp v Harrisongs Music, Ltd*, 420 F Supp 177, 180–81 (SDNY 1976) (finding a composer’s subconscious appropriation of a copyrighted work sufficient to permit a finding of “actual copying”).

<sup>21</sup> See *Laureyssens*, 964 F2d at 141.

the fundamental task is the same—courts aim to assess precisely what the defendant’s work has taken from the plaintiff’s and to determine whether that material truly belongs to the plaintiff or is instead part of the public domain, free for all to use.

1. The basic test for substantial similarity.

Most courts evaluate substantial similarity by focusing on the “total concept and feel” of the works at issue.<sup>22</sup> While different circuits describe the mechanics of the test in slightly different ways, the tests are functionally very similar. The Second Circuit has described its inquiry as “whether ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’”<sup>23</sup> When, however, the plaintiff’s design includes both protected and unprotected elements, courts focus on the perspective of a “more discerning ordinary observer” to separate out these unprotected elements.<sup>24</sup>

The Fourth Circuit describes its test slightly differently. This articulation of the inquiry takes the form of two separate prongs,<sup>25</sup> although it functions in much the same way as the more traditional formulation. First, the plaintiff must show that the works are “extrinsically similar because they contain substantially similar ideas that are subject to copyright protection.”<sup>26</sup> Second, the plaintiff must demonstrate that the works are “intrinsically similar,” meaning that they “express those ideas in a substantially similar manner from the perspective of the intended audience of the work.”<sup>27</sup> The test thereby emphasizes that, even within a copyrighted work, certain elements—including the underlying ideas—do not receive any protection.

This concept—known as the idea-expression dichotomy—is a cornerstone of copyright law, employed in every circuit’s substantial similarity test. In fact, the idea-expression dichotomy is

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<sup>22</sup> See, for example, *Boisson v Banian, Ltd.*, 273 F3d 262, 272 (2d Cir 2001), quoting *Knitwaves, Inc v Lollytogs Ltd (Inc)*, 71 F3d 996, 1003 (2d Cir 1995) (“[W]e have [] always recognized that the test is guided by comparing the ‘total concept and feel’ of the contested works.”).

<sup>23</sup> *Laureyssens*, 964 F2d at 141, quoting *Peter Pan Fabrics, Inc v Martin Weiner Corp.*, 274 F2d 487, 489 (2d Cir 1960).

<sup>24</sup> *Laureyssens*, 964 F2d at 141.

<sup>25</sup> *Universal Furniture International, Inc v Collezione Europa USA, Inc.*, 618 F3d 417, 435 (4th Cir 2010) (per curiam).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

central to ensuring that copyright protection does not exceed its proper limits and impinge on First Amendment freedoms.<sup>28</sup> While the Fourth Circuit test notably emphasizes this dichotomy, then, the various circuits' tests cannot vary significantly in their results without exceeding the proper constitutional bounds. A further consequence of this dichotomy is the merger doctrine: a tenet of copyright law according to which, if an idea can be expressed in only one way—if the work and the idea merge into one—then the work cannot receive copyright protection.<sup>29</sup>

2. A thinner form of protection: Substantial similarity in the context of compilations.

Rather than being subject to the basic substantial similarity test, a copyrighted work is treated differently if it is held to be a compilation. As defined by the Copyright Act,<sup>30</sup> a compilation is “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>31</sup> As the definition suggests, the constitutional requirement that a work must be *original* in order to merit copyright protection applies to compilations. Even if a compilation is an arrangement of elements that individually would not merit copyright protection, the compilation as a whole may be eligible for protection if the selection and arrangement of the constituent parts is sufficiently original.<sup>32</sup> In this way, a compilation can be greater than the sum of its parts. Even then, however, a defendant could escape liability for infringement by showing that what she copied from the plaintiff's work did not include the original “selection and arrangement” that earned the work its protection, but instead consisted only of its unoriginal constituent parts.<sup>33</sup> For this reason, “the copyright in a [ ] compilation is

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<sup>28</sup> See *Eldred v Ashcroft*, 537 US 186, 219 (2003) (describing the idea-expression dichotomy as one of the “built-in First Amendment accommodations” at the core of copyright law).

<sup>29</sup> See *Baker v Selden*, 101 US 99, 103 (1879).

<sup>30</sup> The “Copyright Act” is used in this Comment as a generic term to refer to all of Title 17.

<sup>31</sup> 17 USC § 101. The classic example of a compilation is an anthology in which already-copyrighted works are included in a specific order. Some courts, however, have held that architectural works of existing styles are compilations. See Part II.D.

<sup>32</sup> See *Feist*, 499 US at 348.

<sup>33</sup> *Id.* at 349.

thin.”<sup>34</sup> Even a slight difference between the defendant’s work and the plaintiff’s will allow the defendant to escape liability. By vastly changing the substantial similarity test, the compilation doctrine adds another inquiry to a copyright suit that can transform the rest of the litigation. To a copyright owner, having her work be held a compilation strips her of almost all the protection she might otherwise enjoy.

### 3. Further complications: Different tests for different categories of works.

Providing an additional level of complexity to the basic test for substantial similarity, category-specific tests have also been employed for certain categories of works. Computer programs, for example, often bear a significant resemblance to one another due to their functional aspects,<sup>35</sup> so the Second Circuit pioneered a different test for use only in this area. There may be only one or two ways to achieve a certain end using a given programming language, so two programs that aim to compete within the same market may look very similar, even if one was created entirely without reference to the other. In order to deal with these analytical problems, the Second Circuit proposed a new three-step inquiry into substantial similarity specifically for the computer program context, called the abstraction-filtration-comparison test.<sup>36</sup> First, the court identifies the levels of abstraction within the program, beginning with the program’s code and culminating with its ultimate function.<sup>37</sup> This first step was likened by the Second Circuit to reverse engineering, as the court might

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<sup>34</sup> *Id.* In this case, the Court held that the plaintiff’s phone book—an arrangement of a given set of names and corresponding phone numbers in alphabetical order—was so uncreative and so functionally required that it did not merit protection at all. *Id.* at 362. Because the copyright protection was limited to the *arrangement*, and because that arrangement was alphabetical and thus wholly unoriginal, the work received no protection. *Id.* (“The selection, coordination, and arrangement of [the plaintiff’s] white pages do not satisfy the minimum constitutional standards for copyright protection.”).

<sup>35</sup> While computer programs might seem a natural area for patent protection, given their functional aspects, recent Supreme Court doctrine has raised the bar considerably for software patents to be found valid. See generally *Alice Corp Pty Ltd v CLS Bank International*, 134 S Ct 2347 (2014). As patent protection for computer software has become harder to obtain, securing copyright protection for these same works has grown increasingly vital.

<sup>36</sup> See *Computer Associates International, Inc v Altai, Inc*, 982 F2d 693, 706 (2d Cir 1992). Since its introduction, the test has been widely adopted by other circuits. See Bruce Abramson, *Promoting Innovation in the Software Industry: A First Principles Approach to Intellectual Property Reform*, 8 BU J Sci & Tech L 75, 123–24 (2002).

<sup>37</sup> See *Altai*, 982 F2d at 707.



gloss over the minutiae of each line of code to identify instead the broader contours of the program's functionality.<sup>38</sup> The court then seeks to filter the protectable elements from the unprotectable ones, by identifying, at each level of abstraction, whether each aspect of the program was included as part of the creator's expression or whether it was dictated by functional considerations or belonged to the public domain.<sup>39</sup> Once the court has sifted out the protectable aspects of the works at issue, these elements can then be compared in the third step of the court's inquiry.<sup>40</sup> Here, the court identifies whether the defendant copied any protected expression from the plaintiff's work and also evaluates "the copied portion's relative importance with respect to the plaintiff's overall program."<sup>41</sup> By creating another yardstick by which similarity is measured, this time a category-specific one,<sup>42</sup> the abstraction-filtration-comparison test further complicated an already-complex body of law. Thanks to the many developing tests, the substantial similarity inquiry now varies significantly, not only among circuits, but also among categories of copyrighted works.

## B. Architectural Works before the AWCPA

Before the passage of the AWCPA, architectural works were not protected under the Copyright Act. Although the 1976 Act extended protection to "pictorial, graphic, and sculptural works," this protection did not extend to the "utilitarian aspects" of "useful article[s]" or of any work.<sup>43</sup> Courts held that architectural works, because of their pervasive functional aspects, fell within the definition of "useful articles" and thus were subject to the "utilitarian aspect" restriction.<sup>44</sup> The protection extended to "pictorial,

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<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 710.

<sup>41</sup> *Altai*, 982 F2d at 710.

<sup>42</sup> While the abstraction-filtration-comparison test was developed for use in computer software cases, the Tenth Circuit has since applied it to *all* categories of copyrighted work. See, for example, *Country Kids 'n City Slicks, Inc v Sheen*, 77 F3d 1280, 1284–88 (10th Cir 1996) (applying the test to copyrighted dolls).

<sup>43</sup> Copyright Act of 1976 § 101, 90 Stat at 2543, codified as amended at 17 USC § 101.

<sup>44</sup> See, for example, *Robert R. Jones Associates, Inc v Nino Homes*, 858 F2d 274, 278 (6th Cir 1988) ("[A]rchitectural plans necessarily depict a useful article and are subject to this restriction."); *Demetriades v Kaufmann*, 680 F Supp 658, 663 (SDNY 1988) ("Architectural plans, as drawings of a technical nature, are eligible for copyright protection. Because such plans depict a useful article, however, they are subject to certain qualifications peculiar to this form of work.") (quotation marks and citation omitted).

graphic, and sculptural works” did, however, include “technical drawings, diagrams, and models.”<sup>45</sup> Courts held that this included architectural drawings.<sup>46</sup> In 1988, Congress further confirmed this by changing the definition slightly to include “diagrams, models, and technical drawings, including architectural plans.”<sup>47</sup>

While architectural drawings themselves could be protected by copyright, that protection did not include the exclusive right to build the structure described by the drawings.<sup>48</sup> An architect could, however, collect damages from someone who wrongfully copied her drawings, and the damages could include losses suffered due to the subsequent use of those infringing copies to build the structure.<sup>49</sup> In other words, the original architect could collect lost profits from the infringer’s construction of a structure based on the plans. The actual building, however, did not infringe the copyright; it would be relevant only to the question of damages arising from the original infringement (the copying of the drawings).<sup>50</sup> Thus, an architect could not collect any damages without proving that the drawings themselves were infringed. If the builder instead copied directly from the building, which was outside the 17 USC § 102 categories and not copyrightable, no infringement occurred.

The United States joined the Berne Convention for the Protection of Literary and Artistic Works on March 1, 1989.<sup>51</sup> Joining the Berne Convention meant that American authors’ works were protected internationally; in exchange for according protection to works created elsewhere, the United States ensured that

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<sup>45</sup> Copyright Act of 1976 § 101, 90 Stat at 2543, codified as amended at 17 USC § 101.

<sup>46</sup> See *Robert R. Jones Associates*, 858 F2d at 278.

<sup>47</sup> Berne Convention Implementation Act of 1988 § 4(a)(1)(A), Pub L No 100-568, 102 Stat 2853, 2854, codified as amended at 17 USC § 101.

<sup>48</sup> See *Robert R. Jones Associates*, 858 F2d at 280.

<sup>49</sup> See *id* at 280–81.

<sup>50</sup> Courts generally awarded a successful plaintiff restitution damages equal in amount to the architect’s fee that would have been charged (or, in some cases, had been charged) for the creation of the original plan. See, for example, *Demetriades*, 680 F Supp at 665–66 & n 12 (noting that, if held liable, the defendant could be ordered to pay the \$40,000 fee the plaintiff originally charged for the design); *Herman Frankel Organization, Inc v Wolfe*, 1974 US Dist LEXIS 5994, \*11 (ED Mich) (awarding a “reasonable architect’s fee of \$9,000.00”); *RPM Management, Inc v Apple*, 943 F Supp 837, 839 (SD Ohio 1996) (discussing a jury award that consisted of \$5,000 in actual damages and \$10,000 in quantum meruit, presumably equal to the fee that the plaintiff could have charged for the design).

<sup>51</sup> *Leicester v Warner Brothers*, 232 F3d 1212, 1217 (9th Cir 2000).

other countries would protect works of American origin.<sup>52</sup> As part of an effort to ensure that international copyright law was adequately consistent to permit this reciprocity, the Berne Convention required member states to protect architectural works under their copyright laws.<sup>53</sup> During the initial legislative process, as Congress aimed to become compliant with the Convention, some confusion arose regarding whether it was necessary, for purposes of compliance, to add architectural works to the list of categories protected by copyright or whether the existing back door for architects, which allowed protection only for drawings, was sufficient to comply.<sup>54</sup> Due to this confusion, the Berne Convention Implementation Act of 1988,<sup>55</sup> the first legislative effort to update American law and bring it into full compliance with Berne, did not add architectural works to the § 102 list of categories.<sup>56</sup>

In 1989, however, the Register of Copyrights submitted a report to Congress concluding that the Berne Convention required that protection be extended to architecture explicitly, by revising § 102.<sup>57</sup> Protecting only architectural drawings was inadequate.<sup>58</sup> Shortly thereafter, the AWCPA was introduced.<sup>59</sup> Its passage brought the United States into compliance with the Berne Convention by explicitly providing protection for architectural works.

### C. Interpreting the AWCPA

The Copyright Act now defines an “architectural work” as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.”<sup>60</sup> Under this definition, “[t]he work includes the overall

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<sup>52</sup> See *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)* § (1)(a) (WIPO), archived at <http://perma.cc/93X5-3PDT> (“Works originating in one of the Contracting States . . . must be given the same protection in each of the other Contracting States as the latter grants to the works of its own nationals.”).

<sup>53</sup> See Berne Convention for the Protection of Literary and Artistic Works Art 2(1) (cited in note 2).

<sup>54</sup> See *Copyright Amendments Act of 1990*, HR Rep No 101-735, 101st Cong, 2d Sess 11 (1990), reprinted in 1990 USCCAN 6935, 6942 (recounting expert testimony before Congress suggesting that “creation of a separate statutory provision for works of architecture might not be required for compliance” and recommending further study before action was taken).

<sup>55</sup> Pub L No 100-568, 102 Stat 2853, codified as amended in various sections of Title 17.

<sup>56</sup> See HR Rep No 101-735 at 11 (cited in note 54).

<sup>57</sup> See *id.* at 11–12.

<sup>58</sup> See *id.* at 19.

<sup>59</sup> See *id.* at 12.

<sup>60</sup> 17 USC § 101.

form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”<sup>61</sup> The House report specifically described these “individual standard features” as including “common windows, doors, and other staple building components.”<sup>62</sup> The committee set out to balance the goal of incentivizing the creation of architectural works through granting protections to architecture against the goal of allowing subsequent creators to use existing works in developing their own contributions. In the case of standard features, the House report explains that Congress viewed the latter goal as more important than the former.<sup>63</sup> While courts have looked to the House report for guidance in interpreting the AWCPA,<sup>64</sup> neither the text alone nor the report itself has managed to resolve the emerging disagreement about how precisely courts should analyze copyright eligibility and similarity in the context of architectural works.

The House report suggests that Congress intended that certain established doctrines of copyright law be applied to architectural works in exactly the same way they are applied to other works. The House report states, “The proposed legislation incorporates the general standards of originality applicable for all other copyrightable subject matter.”<sup>65</sup> It also states, “Subjective determinations of artistic or aesthetic merit are inappropriate and contrary to fundamental principles of copyright law.”<sup>66</sup> In this way, the legislature likely intended to acknowledge the holding of *Bleistein v Donaldson Lithographing Co.*,<sup>67</sup> a case in which the Supreme Court famously refused to let copyright protection depend on judicial assessments of the work’s artistic or aesthetic quality.<sup>68</sup> Thus, judges are not to determine the level of protection afforded to an architectural work based on whether they consider it to be a high-quality work. The only question left for the courts is the work’s originality.

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<sup>61</sup> 17 USC § 101.

<sup>62</sup> HR Rep No 101-735 at 18 (cited in note 54).

<sup>63</sup> *Id.* (noting that granting copyright to these standard features “would impede, rather than promote, the progress of architectural innovation”).

<sup>64</sup> See, for example, *Intervest Construction, Inc v Canterbury Estate Homes, Inc*, 554 F3d 914, 919 (11th Cir 2008). No Senate report is available regarding the AWCPA.

<sup>65</sup> HR Rep No 101-735 at 21 (cited in note 54).

<sup>66</sup> *Id.*

<sup>67</sup> 188 US 239 (1903).

<sup>68</sup> See *id.* at 251 (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

Additionally, the House report specifically states that determinations of infringement of architectural [sic] works are to be made according to the same standard applicable to all other forms of protected subject matter. The references in the definition of “architectural work” to “overall form,” and to the nonprotectibility of “individual standard features” are not intended to indicate that a higher standard of similarity is required to prove infringement of an architectural work, or that the scope of protection of architectural works is limited to verbatim or near-verbatim copying.<sup>69</sup>

This passage strongly suggests that Congress did not intend that courts would adopt a presumption that most architectural works are mere compilations. Because treating architectural works as compilations would provide them with only “thin” protection, such a rule would, in essence, amount to requiring a higher standard of similarity, thus defying express legislative intent and potentially contravening the Berne Convention.

The legislative history also demonstrates some intent to shape a slightly different form of copyright protection specifically for architecture, a departure from the existing doctrine of copyright law. Since before the AWCPA, the law has included a dichotomy between “useful article[s]” and artistic ones.<sup>70</sup> In the case of “pictorial, graphic, or sculptural works,” a useful article was—and still is—protected “only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>71</sup> This statutory language was a legislative effort to codify the result in the famous case *Mazer v Stein*,<sup>72</sup> a holding that courts have since turned into a “conceptual separability” test.<sup>73</sup> The House report states that

the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles. There is considerable scholarly and judicial disagreement

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<sup>69</sup> HR Rep No 101-735 at 21 (cited in note 54).

<sup>70</sup> See Copyright Act of 1976 § 101, 90 Stat at 2544, codified as amended at 17 USC § 101.

<sup>71</sup> 17 USC § 101; Copyright Act of 1976 § 101, 90 Stat at 2543.

<sup>72</sup> 347 US 201 (1954).

<sup>73</sup> *Galiano v Harrah's Operating Co*, 416 F3d 411, 417 & n 11 (5th Cir 2005).

over how to apply the separability test, and the principal reason for not treating architectural works as pictorial, graphic, or sculptural works is to avoid entangling architectural works in this disagreement.<sup>74</sup>

Thus, the AWCPA sought to remove architectural works from the middle of judicial approaches to the separability test. In its place, the House report outlined an entirely different test for how courts are to evaluate functionality in the context of architectural works. First, the “work should be examined to determine whether there are original design elements present, including overall shape and interior architecture.”<sup>75</sup> Second, the court should consider whether those “design elements are functionally required.”<sup>76</sup> If not, “the work is protectible without regard to physical or conceptual separability.”<sup>77</sup> The House report thus described an element-by-element evaluation of functionality, rather than a wholesale evaluation of the work’s functionality.

This language seems to describe the overall shape of a work as one of the design elements it would contain, thus further muddying the distinction between a compilation and an original contribution to architecture.<sup>78</sup> If overall shape is distinct from arrangement of features, the House report could be suggesting that the layout of a building would itself be a feature of that building, thus foreclosing any application of the compilation doctrine to architecture. Alternatively, the legislature could just be instructing courts to include the layout of a building in the functionality evaluation, thereby limiting the compilation protection to layouts that are not functionally required. The former possibility would involve a significant departure from existing doctrine. The latter is, instead, a great deal more like the Supreme Court’s conclusion in *Feist Publications, Inc v Rural Telephone Service Co*<sup>79</sup> that an arrangement of a given set of names and corresponding phone numbers in alphabetical order is so uncreative and so functionally required that it does not merit protection.<sup>80</sup>

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<sup>74</sup> HR Rep No 101-735 at 20 (cited in note 54) (citation omitted).

<sup>75</sup> Id.

<sup>76</sup> Id at 21.

<sup>77</sup> Id.

<sup>78</sup> See HR Rep No 101-735 at 21 (cited in note 54) (“[T]he aesthetically pleasing overall shape of an architectural work could be protected under this bill.”).

<sup>79</sup> 499 US 340 (1991).

<sup>80</sup> See id at 362 (“The selection, coordination, and arrangement of [the plaintiff’s] white pages do not satisfy the minimum constitutional standards for copyright protection.”). See also note 34 and accompanying text.

## II. A PARADOX DEVELOPS: SUBSEQUENT JUDICIAL TREATMENT OF ARCHITECTURAL WORKS

Just as in other areas of copyright, different courts have used different tests to assess whether a defendant's architectural work infringes a plaintiff's copyright—that is, whether the works are substantially similar. When a court decides to apply one of these tests, many of which are well established in other areas of copyright, to architectural works, the test used becomes a strong predictor of the outcome of the case.

### A. Total Concept and Feel

Under the total concept and feel test,<sup>81</sup> the court compares the works from the point of view of the “ordinary observer” to determine whether they share a “total concept and feel.”<sup>82</sup> If the copyrighted work contains unprotectable elements, courts undertake a “more discerning” analysis to tease out whether the similarities exist only in those unprotectable elements.<sup>83</sup> Courts in the Second Circuit employed this approach in the architecture context in both *Shine v Childs*<sup>84</sup> and *Peter F. Gaito Architecture, LLC v Simone Development Corp.*<sup>85</sup>

#### 1. *Shine v Childs*.

*Shine* is a particularly famous case, likely because it concerns high-level skyscraper design rather than more ordinary architecture.<sup>86</sup> David Childs was an established architect who sat on a panel of experts, called a “jury,” evaluating student work at the Yale School of Architecture.<sup>87</sup> The plaintiff, Thomas Shine, was a student who showed the jury two of his drawings depicting his idea for “a twisting tower with a symmetrical diagonal column grid.”<sup>88</sup> Four years later, Childs was hired to work on the plans for the post–September 11 reconstruction of the World Trade Center and designed a skyscraper.<sup>89</sup> Shine sued for

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<sup>81</sup> See Part I.A.1.

<sup>82</sup> *Boisson v Banian, Ltd.*, 273 F3d 262, 272 (2d Cir 2001).

<sup>83</sup> *Laureyssens v Idea Group, Inc.*, 964 F2d 131, 141 (2d Cir 1992).

<sup>84</sup> 382 F Supp 2d 602 (SDNY 2005).

<sup>85</sup> 602 F3d 57 (2d Cir 2010).

<sup>86</sup> See Su, Note, 101 Nw U L Rev at 1865–66 (cited in note 7).

<sup>87</sup> *Shine*, 382 F Supp 2d at 605.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 606.

infringement, arguing that Childs's plans infringed on his original skyscraper design.<sup>90</sup>

Addressing a motion for summary judgment, the court first rejected Childs's argument that Shine's plans were too "preliminary or conceptual" to merit protection.<sup>91</sup> The court noted that the statute did not require that the design be capable of construction and stated that "once a design includes specific expression and realization of ideas, copying constitutes infringement."<sup>92</sup> The court held that each of the plaintiff's plans met the standard for being a "design of a building" under the AWCPA.<sup>93</sup>

The defendant also argued that the plaintiff's designs were not "sufficiently original to warrant protection under the AWCPA," because they included no original component parts, because any original parts were functionally required, and because the arrangement of the design was not a sufficiently original compilation.<sup>94</sup> The court specifically noted the low bar of originality and pointed out that compilations of unprotectable elements may still merit copyright protection.<sup>95</sup> The language of the court's holding is particularly illustrative:

[T]wisting towers have been built before. Towers with diamond-windowed facades have been built before. Towers with support grids similar to the one in Olympic Tower [the plaintiff's design] have been built before. Towers with setbacks have been built before. But defendants do not present any evidence that the particular combinations of design elements in either [of the plaintiff's plans] are unoriginal. These works each have at least the mere "dash of originality" required for copyrightability.<sup>96</sup>

The court also held that "even if certain of the original design elements of Olympic Tower are dictated by functionality and therefore not copyrightable—a proposition for which there is no apparent support in the case law or the AWCPA—a material issue of fact on this matter remains for trial."<sup>97</sup> Thus, the court

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<sup>90</sup> See *id.* at 605–06.

<sup>91</sup> *Shine*, 382 F Supp 2d at 608.

<sup>92</sup> *Id.* at 608–09 (quotation marks and ellipsis omitted).

<sup>93</sup> *Id.* at 609.

<sup>94</sup> *Id.* at 609–10.

<sup>95</sup> See *Shine*, 382 F Supp 2d at 610, citing *Knitwaves, Inc v Lollytogs Ltd (Inc)*, 71 F3d 996, 1003–04 (2d Cir 1995).

<sup>96</sup> *Shine*, 382 F Supp 2d at 610–11 (citation omitted).

<sup>97</sup> *Id.* at 611.



analyzed this tower according to the functionality test described in the AWCPA House report.<sup>98</sup> The court considered the tower to be a compilation of existing design elements—but still held that this compilation met the low standard of originality required for copyright.

The court then considered whether there was a material issue of fact regarding whether the two skyscraper designs were “substantially similar.”<sup>99</sup> The court first considered which test it should use for substantial similarity. The defendants argued for the abstraction-filtration-comparison test used for analyzing computer code in *Computer Associates International, Inc v Altai, Inc*,<sup>100</sup> but the court rejected this approach because breaking down original works into their composite parts would leave nothing but unprotectable elements.<sup>101</sup> It described “total concept and feel” as the dominant approach in the Second Circuit.<sup>102</sup> It then discussed the “more discerning ordinary observer” test, which considers whether substantial similarity can be found in the *protectable* elements of the plaintiff’s work and is applied in cases in which individual components of the plaintiff’s design are unprotectable.<sup>103</sup> The court, in the end, turned to “common sense,”<sup>104</sup> without ever explicitly adopting any test, and based its conclusions on whether reasonable ordinary observers might find that the two towers share a total concept and feel.<sup>105</sup> Although the defendants sought to point out a number of differences, “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>106</sup> The court, having avoided making any explicit legal finding or even clearly choosing a test, simply listed the similarities and the differences between the two towers and concluded that reasonable jurors could disagree as to substantial similarity, so summary judgment was inappropriate.<sup>107</sup>

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<sup>98</sup> See id at 609–10; HR Rep No 101-735 at 20–21 (cited in note 54).

<sup>99</sup> *Shine*, 382 F Supp 2d at 612–13.

<sup>100</sup> 982 F2d 693 (2d Cir 1992).

<sup>101</sup> *Shine*, 382 F Supp 2d at 613.

<sup>102</sup> Id at 612.

<sup>103</sup> See id at 615.

<sup>104</sup> Id.

<sup>105</sup> *Shine*, 382 F Supp 2d at 615.

<sup>106</sup> Id, quoting *Tufenkian Import/Export Ventures, Inc v Einstein Moomjy, Inc*, 338 F3d 127, 132 (2d Cir 2003).

<sup>107</sup> *Shine*, 382 F Supp 2d at 615–16.

2. *Peter F. Gaito Architecture, LLC v Simone Development Corp.*

In *Gaito*, a city asked the plaintiffs to draw up plans for a mixed-use development.<sup>108</sup> After a dispute, another team was selected: the defendants.<sup>109</sup> The plaintiffs claimed that the defendants' development plans infringed their own and alleged thirty-five specific similarities.<sup>110</sup> The district court granted the defendants' motion to dismiss, holding that there was no substantial similarity between the two designs, and the plaintiffs appealed.<sup>111</sup>

In this case, the Second Circuit determined that the appropriate test was the more discerning ordinary observer test, because much of the plaintiffs' design was made up of elements that were not protectable.<sup>112</sup> The court also noted that it would be inappropriate to dissect the work into its constituent parts and compare only the copyrightable elements, as such a process would miss the "total concept and feel" that is the mainstay of the test.<sup>113</sup>

The court then applied the test de novo and determined that there was an "utter lack of similarity between the two designs."<sup>114</sup> The court described the significant differences between the designs—the plaintiffs' design included three separate structures, while the defendants created a single forty-two-story building with mixed-use elements and added a separate row of townhouses.<sup>115</sup> The court also emphasized that many of the similarities, such as the designs' architectural styles, consisted of unprotectable ideas—like the idea of a central, prominent residential tower.<sup>116</sup> This is one way of dealing with the copyright protection of architectural works: treating architectural styles as ideas, while individual works are expressions of that idea.

In this sense, although the courts reached different results, the Second Circuit's inquiry in *Gaito* closely mirrored the district court's in *Shine*. By looking past superficial similarities and inquiring into the similarities in the underlying creative choices made in the two designs, both courts provided the large-scale

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<sup>108</sup> *Gaito*, 602 F3d at 60.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 60–61.

<sup>111</sup> *Id.* at 61.

<sup>112</sup> See *Gaito*, 602 F3d at 66, 69.

<sup>113</sup> *Id.* at 66–67.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Gaito*, 602 F3d at 68.

works at issue with adequate protection while leaving subsequent architects adequate room to explore the same design concepts from their own creative points of view. While the *Shine* trial court was not entirely clear about which test it used, the Second Circuit took the opportunity presented by *Gaito* to be clear: substantial similarity in the context of architecture should be assessed in the same way as in any other context. Given that architectural works will inevitably use existing elements—whether these be the “common windows, doors, and other staple building components” mentioned in the House report on the AWCPA<sup>117</sup> or something more akin to an idea, like the “twisting towers” at issue in *Shine*<sup>118</sup>—the appropriate perspective will almost always be that of the more discerning observer.

### 3. Two-pronged extrinsic and intrinsic similarity.

Instead of focusing on either the ordinary or more discerning observer, the Fourth Circuit has decided to apply its own two-pronged test for substantial similarity, which it uses in all copyright cases,<sup>119</sup> to architecture. *Universal Furniture International, Inc v Collezione Europa USA, Inc*,<sup>120</sup> although not an architecture case, illustrates how this two-pronged test works in practice. The case concerned two furniture collections, one made by a high-end furniture company and another made by a company specializing in “knock-off” furniture.<sup>121</sup>

The first prong of the Fourth Circuit’s test addresses extrinsic similarity: Do the works “contain substantially similar ideas that are subject to copyright protection”?<sup>122</sup> This is an objective inquiry, and expert testimony may be relevant.<sup>123</sup> In the furniture context, this prong became a question whether the furniture collections shared “historical themes and ornamentation.”<sup>124</sup> In the architecture context, this would likely be a question whether the two works share an architectural style and common ornamental elements, like trim.

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<sup>117</sup> HR Rep No 101-735 at 18 (cited in note 54). See also text accompanying notes 62–63.

<sup>118</sup> *Shine*, 382 F Supp 2d at 610–11. See also text accompanying notes 94–96.

<sup>119</sup> See text accompanying notes 25–27.

<sup>120</sup> 618 F3d 417 (4th Cir 2010) (per curiam).

<sup>121</sup> *Id* at 424.

<sup>122</sup> *Id* at 435.

<sup>123</sup> *Id*.

<sup>124</sup> *Universal Furniture*, 618 F3d at 436.

The second prong focuses on intrinsic similarity: Would an ordinary observer find the works to be substantially similar?<sup>125</sup> This prong is essentially identical to the “total concept and feel” test discussed above—it focuses on the intended audience of the works and the “total concept and feel of the works.”<sup>126</sup> In *Universal Furniture*, the appellate court affirmed the district court’s finding of intrinsic similarity, which was based on an examination of the individual elements of the two furniture collections—for example, the “matching inlays in the side doors bordered by matching carved moldings.”<sup>127</sup>

In this case, the court found that the plaintiff’s copyrighted furniture was a compilation of previously existing design elements but that the compilation was sufficiently original to merit protection.<sup>128</sup> It is not entirely clear how the compilation status of the plaintiff’s work shaped the court’s analysis of the two prongs. The court did mention that the defendant argued on appeal that the district court’s analysis of the second prong “focused on noncopyrightable elements.”<sup>129</sup> As a whole, though, the discussion of compilations was limited to the court’s determination of originality, not the issue of substantial similarity.

*Charles W. Ross Builder, Inc v Olsen Fine Home Building, LLC*<sup>130</sup> demonstrates the application of the Fourth Circuit’s two-pronged similarity test to architectural works. In this case, the plaintiff hired an architect to design a Georgian-style home.<sup>131</sup> Potential buyers toured that home and took brochures for the design, but then hired another company to design a custom home for them.<sup>132</sup> The plaintiff later alleged that the custom-built home infringed its design.<sup>133</sup> The district court granted the defendants summary judgment, holding that the plaintiff had failed to show substantial similarity.<sup>134</sup> To reach this result, the district court used the “more discerning observer” test (the Second Circuit test) as well as the similar Eleventh Circuit test (which treats architecture as a compilation with only thin

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<sup>125</sup> Id at 437.

<sup>126</sup> Id at 436, quoting *Lyons Partnership, LP v Morris Costumes, Inc*, 243 F3d 789, 801 (4th Cir 2001).

<sup>127</sup> *Universal Furniture*, 618 F3d at 437.

<sup>128</sup> Id at 435.

<sup>129</sup> Id at 437.

<sup>130</sup> 496 Fed Appx 314 (4th Cir 2012).

<sup>131</sup> Id at 315.

<sup>132</sup> Id at 316.

<sup>133</sup> Id.

<sup>134</sup> See *Ross*, 496 Fed Appx at 316.

protection), not the two-part intrinsic/extrinsic similarity test that is the norm in the Fourth Circuit.<sup>135</sup> The district court departed from the Fourth Circuit norm out of concern that the works at issue in this case contained many unprotectable elements. By using other tests instead, the court sought to sift out those unprotectable elements—the elements that are common in the Georgian style—and compare the works based on only those elements that were original.<sup>136</sup>

The appellate court held that the two-pronged intrinsic/extrinsic similarity test is not limited to any given subject matter and is appropriate for the purpose of analyzing architectural work.<sup>137</sup> The test had been used in past cases in which the copyrighted material was not wholly original, and it is appropriate for analyzing works that contain unprotectable elements.<sup>138</sup> It is also appropriate for cases in which the copyrighted work is a compilation.<sup>139</sup> However, the court rejected the Eleventh Circuit's approach by refusing to hold that the works at issue were compilations.<sup>140</sup> Essentially, the court argued that, even if the work is a compilation, the two-pronged test was still appropriate.<sup>141</sup> The court stated that architectural compilations are the same as other compilations and thus do not require a special test.<sup>142</sup> Because the court was unable to determine whether the district court would have reached the same result if it had used the correct (two-pronged) test, it remanded.<sup>143</sup>

The two-pronged test essentially includes the “total concept and feel” test, with the addition of the first, objective prong. Logically, this would suggest that a plaintiff trying to demonstrate wrongful copying under the two-pronged test would face a higher burden because she would additionally have to prove the first prong. On the other hand, the first prong is of limited significance in the cases above. It would likely be satisfied whenever the two works at issue are of the same style. There has not yet been a case under the AWCPA in which the defendant argued that her work was of a different style from the plaintiff's. If the

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<sup>135</sup> *Id.* at 319. For a discussion of the Eleventh Circuit test, see Part II.B.

<sup>136</sup> See *Ross*, 496 Fed Appx at 319.

<sup>137</sup> *Id.*

<sup>138</sup> See *id.* at 319–20.

<sup>139</sup> See *id.* at 320.

<sup>140</sup> See *Ross*, 496 Fed Appx at 320.

<sup>141</sup> See *id.*

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

defendant's work truly was of a different style (for example, if the defendant took the plaintiff's colonial home and reinterpreted it in a Mediterranean style), it is extremely difficult to imagine that a plaintiff could succeed under *any* of the above tests. Thus, in cases involving architecture, the first, "extrinsic" prong does little work.

The first prong is, however, an opportunity for the parties to present expert testimony.<sup>144</sup> This could be of help in demonstrating ways that the commonalities between the works were truly demonstrations of the original creator's creativity, but it is hard to imagine that expert testimony would influence the inquiry very strongly. Functionally, the two-pronged test is remarkably similar to the "total concept and feel" test, with the possible additional advantage of expert testimony. In fact, the test—or rather the key words the court uses to describe the test—may not altogether matter. The crucial question may be how courts treat the fact that the works are of the same style.<sup>145</sup>

B. The Compilation and Difference Test: *Intervest Construction, Inc v Canterbury Estate Homes, Inc*

The Eleventh Circuit has, in essence, developed a new test for architectural works that can be described as the "compilation and difference" test. Although the court failed to label its holding a test, it found in *Intervest Construction, Inc v Canterbury Estate Homes, Inc*<sup>146</sup> that the plaintiff's plan was a compilation, that the copyright was thin, and thus that the differences the district court identified amounted to a lack of substantial

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<sup>144</sup> See *Ross*, 496 Fed Appx at 319.

<sup>145</sup> *Precision Craft Log Structures, Inc v Cabin Kit Co*, 2007 WL 1412502 (D Idaho), is a rarity: a case in which two home designs, both of which belonged to a well-established preexisting architectural style, were held to be substantially similar. *Id.* at \*1. The defendant began to advertise and sell home packages that the plaintiff claimed were exact copies of the plaintiff's designs for log homes. *Id.* The plaintiff sued for copyright infringement, and the defendant defaulted by failing to respond to the suit. *Id.* Because of this default, the court found that Cabin Kit Company had willfully infringed. *Id.* at \*2. This case is highly unusual not only because of the defendant's default but also because the plaintiff alleged that the defendant's home plans were exact copies. In other situations, however, the alleged infringer usually changes a few elements of the design, which can muddle the question of substantial similarity.

In fact, in light of how courts treat these minor customization changes, potential infringers may essentially have a road map to evasion of copyright infringement; by adding a few additional features or changing some of a house's fittings, a developer could avoid liability for infringement without meaningfully differentiating her design from the original.

<sup>146</sup> 554 F3d 914 (11th Cir 2008).

similarity.<sup>147</sup> This is, functionally at least, another inquiry entirely—one based on the finding of a compilation.

In 1992, the plaintiff construction company designed a home plan it called the “Westminster.”<sup>148</sup> Ten years later, the defendant created a similar design and named it the “Kensington.”<sup>149</sup> The plaintiff alleged that the Kensington infringed on the Westminster.<sup>150</sup> The district court held that the differences were too great for there to be substantial similarity and thus granted summary judgment to the defendant.<sup>151</sup>

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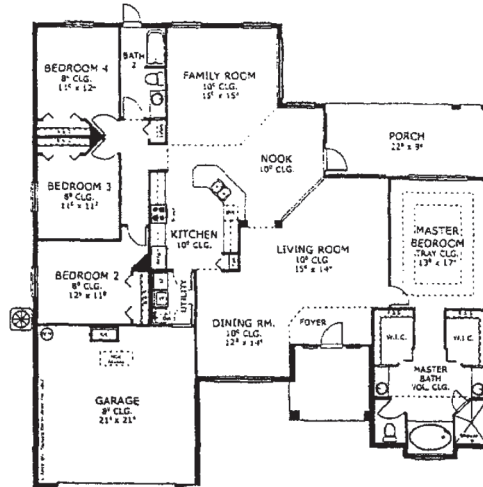
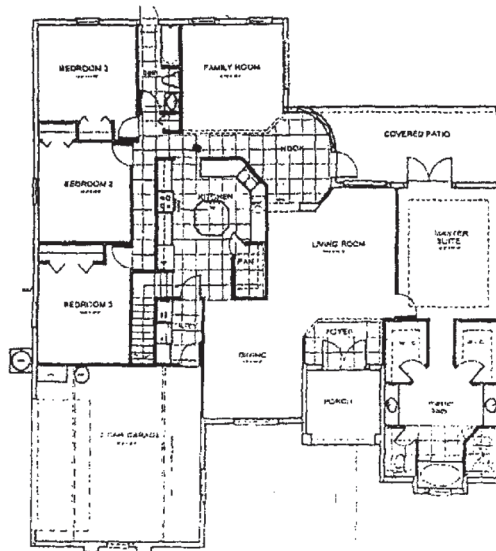
<sup>147</sup> See *id.* at 921.

<sup>148</sup> *Id.* at 916. The plans for the Westminster are shown in Figure 1.

<sup>149</sup> *Id.* For the plans of the Kensington, see Figure 2.

<sup>150</sup> *Intervest*, 554 F3d at 916.

<sup>151</sup> *Id.* at 920–21.

FIGURE 1. THE WESTMINSTER<sup>152</sup>FIGURE 2. THE KENSINGTON<sup>153</sup>


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<sup>152</sup> Id at 922.

<sup>153</sup> Id.



In its opinion, the Eleventh Circuit quoted extensively from the district court's opinion, detailing the differences between the two plans.<sup>154</sup> These differences included the larger pantry in the Kensington, the addition of French doors from the master bedroom opening onto the patio in the Kensington, the addition of a "bonus room" above the garage of the Kensington, and the "markedly different" nooks in the two houses.<sup>155</sup> The court then noted that "the definition of an architectural work closely parallels that of a 'compilation'" and concluded that the Westminster was a compilation, with accordingly thin copyright protection.<sup>156</sup>

As the Eleventh Circuit noted, the final part of the definition of "architectural work" bears some similarity to the definition of "compilation"—with the latter defined as "a work formed by the collection and assembling of preexisting materials or of data . . . in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>157</sup> Given the thin protection accorded to compilations, if a court considers a work of architecture to be only a compilation of preexisting, unprotectable elements, the protection would extend only to the specific arrangement of those elements. That arrangement itself would have to meet some threshold of creativity in order to gain any protection at all; an "entirely typical"<sup>158</sup> arrangement of "standard features"<sup>159</sup> would not be worthy of any protection. Because the copyright protection for a work that met the threshold would be thin, any imitation of the work that is not perfectly identical would not infringe. A subsequent architect could make very minor changes to the building and thus avoid infringing.<sup>160</sup> Clearly, if an architectural work is considered to be a compilation, then its creator would enjoy substantially less protection. While other courts have not explicitly labeled architectural works that fit within an existing style as compilations, the Eleventh Circuit is not alone in according such limited protection to those works.<sup>161</sup>

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<sup>154</sup> See *Intervest*, 554 F3d at 916–18.

<sup>155</sup> *Id.* at 917–18.

<sup>156</sup> *Id.* at 919.

<sup>157</sup> 17 USC § 101. See also Part I.A.2.

<sup>158</sup> *Feist*, 499 US at 362.

<sup>159</sup> 17 USC § 101.

<sup>160</sup> See, for example, *Intervest*, 554 F3d at 917–18, 921 (affirming the district court's determination that seemingly minor differences between two houses' layouts, such as doors that swung in different directions and an enlarged pantry, were enough to avoid a claim of infringement).

<sup>161</sup> See, for example, *Zalewski v Cicero Builder Dev, Inc*, 754 F3d 95, 103–04, 107 (2d Cir 2014) (criticizing the Eleventh Circuit's categorization of architectural works as

Despite this temptation, however, the statutory definition also supports the opposite argument—that certain architectural works are worthy of broader protection. The statute specifically states that protection can include the “overall form” of a building.<sup>162</sup> The House report on the AWCPA also supports this reading; it specifically states that the exclusion of individual standard features “is not [ ] intended to exlude [sic] from the copyright in the architectural work any individual features that reflect the erchitect’s [sic] creativity.”<sup>163</sup> This demonstrates some intent on the part of the legislature to provide copyright protection for certain works of architecture that go beyond “individual standard features”<sup>164</sup> and instead “reflect the erchitect’s [sic] creativity.”<sup>165</sup>

The *Intervest* court also approved the district court’s analysis of the differences in the houses’ layouts, implicitly disagreeing with the *Shine* court, which noted that a list of differences, in the face of a shared total concept and feel, is not strong evidence against substantial similarity.<sup>166</sup> The *Intervest* court also departed from *Shine* in its discussion of how the substantial similarity test should be administered. The Eleventh Circuit declined to focus on the viewpoint of the “average lay observer,” instead noting that “a compilation is entitled to the least, narrowest or ‘thinnest’ protection.”<sup>167</sup> The court then held that the analysis must hinge on the similarity of the protected elements.

The court held that the district court was correct in granting summary judgment to the defendant.<sup>168</sup> Because the Westminster was a compilation accorded only thin protection, “the differences in the protectable expression were so significant that, as a matter of law, no reasonable properly-instructed jury of lay observers could find the works substantially similar.”<sup>169</sup>

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compilations, but nonetheless finding that an architectural work that adheres to a preexisting style is accorded only thin copyright protection).

<sup>162</sup> 17 USC § 101.

<sup>163</sup> HR Rep No 101-735 at 18 (cited in note 54) (citation omitted).

<sup>164</sup> 17 USC § 101.

<sup>165</sup> HR Rep No 101-735 at 18 (cited in note 54) (citation omitted).

<sup>166</sup> Contrast *Intervest*, 554 F3d at 921, with *Shine*, 382 F Supp 2d at 615.

<sup>167</sup> *Intervest*, 554 F3d at 920–21.

<sup>168</sup> *Id.* at 921.

<sup>169</sup> *Id.*

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While the different circuits have not been entirely straightforward in how they describe their approaches to analyzing architectural works' similarity, two tests have emerged. Some courts hew close to the wording used in more traditional copyright areas and analyze the total concept and feel of the works involved, providing lower courts with little additional guidance for tailoring their inquiry to this new field of copyright protection. The Eleventh Circuit, for its part, has held that works belonging to an established architectural style are compilations, a holding that fundamentally transforms the inquiry of substantial similarity and accords architects much less protection than they had enjoyed previously.

### III. TREATING ESTABLISHED STYLES AS GENRES

A significant body of jurisprudence already exists describing how courts treat literary works of established genres. Under this body of law, genres are defined by their generic conventions—elements that appear time and time again within that genre. These generic conventions can be described in terms of a few categories.

“Scène à faire” is French for “a scene which must be done.”<sup>170</sup> In a literary sense, this refers to a scene of a given form, like a wedding near the end of the story. This turns up in Shakespeare’s *Much Ado about Nothing*,<sup>171</sup> the film *Sweet Home Alabama*,<sup>172</sup> and the initial season of the television show *Californication*,<sup>173</sup> and some scholars suggest that it is a hallmark of Shakespearean comedies.<sup>174</sup> It is a trope of the romantic comedy genre. These are scenes à faire in the most traditional sense: they are linchpin scenes on which the entire work relies and which define the genre to which the work belongs. While the scene à faire is crucial, it still leaves room for creativity, however—while *Much Ado about Nothing*’s final scene is a double wedding that serves as

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<sup>170</sup> Stephen H. Eland, Note, *The Abstraction-Filtration Test: Determining Non-literal Copyright Protection for Software*, 39 Vill L Rev 665, 677 n 58 (1994).

<sup>171</sup> William Shakespeare, *Much Ado about Nothing* Act V, Scene IV at 63–66 (Rivingtons 1890) (A. Wilson Verity, ed).

<sup>172</sup> *Sweet Home Alabama* (Touchstone Pictures 2002).

<sup>173</sup> *Californication*, Season 1, Episode 12: “The Last Waltz” (Showtime, Oct 29, 2007).

<sup>174</sup> See, for example, Lisa Hopkins, *The Shakespearean Marriage: Merry Wives and Heavy Husbands* 16 (Macmillan 1998).

denouement,<sup>175</sup> *Sweet Home Alabama*'s features a showdown between two hopeful grooms.<sup>176</sup>

In a legal sense, “scènes à faire” refers to more than just scenes per se—it refers to any generic convention, whether it be a scene, a plot device, or a setting.<sup>177</sup> Generic conventions can also include stock characters, like the Wild West sheriff with a rough past and an unconventional approach to the law. This characterizes the television show *Longmire*<sup>178</sup> and the films *Blazing Saddles*<sup>179</sup> and *Coogan's Bluff*.<sup>180</sup> This is the sine qua non of the Western genre. There are also classic plots like the *Romeo and Juliet* story of young lovers from opposite worlds.<sup>181</sup> This plot defines *Titanic*,<sup>182</sup> *Pretty in Pink*,<sup>183</sup> *Shrek*,<sup>184</sup> *Abie's Irish Rose*,<sup>185</sup> and *The Cohens and the Kellys*.<sup>186</sup>

These generic conventions are elements seen time and time again. Individual writers cannot claim them as part of their copyright, although their own expressions of these common themes could certainly be eligible for copyright protection. If the conventions themselves were protected by copyright, then future authors would be left with too little. Because copyright aims to strike a balance between incentivizing creation and permitting future authors adequate creative freedom, the law allows the later authors to use these existing tropes in their new works.

Still, individual expressions of larger generic conventions can be copyrighted. While an author cannot copyright the idea of

<sup>175</sup> See Fredson Bowers, *Climax and Protagonist in Shakespeare's Dramatic Structure*, 47 S Atlantic Rev 22, 34 (May 1982).

<sup>176</sup> See Stephen Holden, *Film Review; A Vexed Heart: Grits or Foie Gras?* (NY Times, Sept 27, 2002), online at <http://www.nytimes.com/2002/09/27/movies/film-review-a-vexed-heart-grits-or-foie-gras.html> (visited Jan 10, 2017) (Perma archive unavailable).

<sup>177</sup> See *Bucklew v Hawkins, Ash, Baptie & Co, LLP*, 329 F3d 923, 929 (7th Cir 2003) (describing scènes à faire as features of a work that “are so rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another”).

<sup>178</sup> See, for example, *Longmire*, Season 1, Episode 1: “Pilot” (A&E, June 3, 2012).

<sup>179</sup> *Blazing Saddles* (Warner Bros 1974).

<sup>180</sup> *Coogan's Bluff* (Universal Pictures 1968).

<sup>181</sup> See generally William Shakespeare, *Romeo and Juliet* (Scott, Foresman 1914) (William Allan Neilson, ed).

<sup>182</sup> *Titanic* (Paramount Pictures 1997).

<sup>183</sup> *Pretty in Pink* (Paramount Pictures 1986).

<sup>184</sup> *Shrek* (DreamWorks Pictures 2001).

<sup>185</sup> See generally Anne Nichols, *Abie's Irish Rose* (Samuel French 1937).

<sup>186</sup> *The Cohens and the Kellys* (Universal Pictures 1926). This film was the subject of the famous case *Nichols v Universal Pictures Corp*, 45 F2d 119 (2d Cir 1930), in which the scriptwriter of *Abie's Irish Rose* alleged copyright infringement by *The Cohens and the Kellys*. See generally id.

having a spy as a main character, she can copyright James Bond.<sup>187</sup> The merger doctrine can also come into play if the plaintiff's expression of generic conventions occupies the field.<sup>188</sup> The question becomes: Is there some other way to express the same idea?

A good example of judicial treatment of literary works is *Allen v Scholastic Inc.*<sup>189</sup> In that case, the owner of a copyright in a children's book called *The Adventures of Willy the Wizard—No 1 Livid Land* alleged that J.K. Rowling's *Harry Potter and the Goblet of Fire* infringed his copyright, noting a number of commonalities between the books.<sup>190</sup> The court analyzed those similarities using a "total concept and feel" inquiry and concluded that "a reading of the works unequivocally confirms that they are distinctly different in both substance and style, and ultimately engender very different visceral responses from their readers."<sup>191</sup> The court specifically addressed each of the similarities the plaintiff alleged, concluding that these shared features, such as a plot involving a wizard competition, were "not protectible elements" and were "too generic to constitute an expression."<sup>192</sup> The court demonstrated its ability to sort between features that are fairly considered "ideas," which might define a work and yet should remain outside the reaches of copyright, and those that are considered "expression," like a specific character or, as the court put it, "a recognizable identity that can be linked to a particular figure."<sup>193</sup> While the idea of a young, misunderstood protagonist with magical powers would not rise to the level of meriting copyright protection, Harry Potter, the "skinny boy of fourteen with large round glasses, bright green eyes and untidy black hair," imbued with a full backstory and complex motivations, is a copyrightable character.<sup>194</sup> Because the similarities between *The Goblet of Fire* and *Livid Land* were limited to surface-level, even reductive, understandings of the

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<sup>187</sup> See *Metro-Goldwyn-Mayer, Inc v American Honda Motor Co*, 900 F Supp 1287, 1295–97 (CD Cal 1995).

<sup>188</sup> See text accompanying note 29.

<sup>189</sup> 739 F Supp 2d 642 (SDNY 2011).

<sup>190</sup> *Id* at 645.

<sup>191</sup> *Id* at 657.

<sup>192</sup> *Id* at 662.

<sup>193</sup> *Allen*, 739 F Supp 2d at 660.

<sup>194</sup> *Id* at 649 (quotation marks omitted).

works, there was no infringement—the only things borrowed were ideas.<sup>195</sup>

#### A. How Courts Should Treat Architectural Styles

Based on this established body of law, this Comment proposes that courts should treat architectural styles in much the same way as they treat literary works. Rather than crafting an entirely new approach, courts can simply adopt an existing one—which has developed based on the doctrine of *scènes à faire* in literature—that will permit courts to harness a well-established area of law to apply to the still-new area of architectural copyright. While treating architectural styles as literary genres might not be obvious, the architectural community already possesses the scholarship, categorization, and theory necessary to do so. Because architectural styles are well-defined, a court can take advantage of these existing categories to sift out what should be protected in a new work from the more generic elements, on which a finding of infringement should not be based.

The court's approach in *Gaito* comes closest to this idea.<sup>196</sup> On the one hand, courts should not find substantial similarity when the defendant's work is a different execution of the same style as the plaintiff's work, which would essentially abrogate the well-established merger doctrine. The *Gaito* court safely avoided this, deciding for the defendant based on truly significant differences<sup>197</sup> and specifically noting that the plaintiff should not be afforded ownership over an architectural style—that is, an idea.<sup>198</sup> The court also mentioned that elements that were made necessary by practical considerations, the demands of the client, or engineering necessity should not receive copyright protection.<sup>199</sup>

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<sup>195</sup> *Id.* at 665.

<sup>196</sup> See Part II.A.2.

<sup>197</sup> See *Gaito*, 602 F3d at 66 (“Plaintiffs’ overall design for the Church Street Project, for instance, consists of not one, but three prominent structures.”).

<sup>198</sup> *Id.* at 68:

Indeed, were we to permit plaintiffs to seek recovery for the alleged infringement of, for instance, architecture that was light, airy, transparent, [and] made of glass with hints of traditional materials, we would directly contravene the underlying goal of copyright to encourage others to build freely upon the ideas and information conveyed by a work.

(quotation marks and brackets omitted).

<sup>199</sup> See *id.*

While other courts have often departed from existing copyright law and instead sought to lay out specific rules that work only in the context of architecture, these new doctrinal efforts are unnecessary. Just as other legal systems have included architecture in their copyright law for decades,<sup>200</sup> existing American copyright law can very easily accommodate claims brought under the AWCPA. Analogizing to literature, a realm of copyright with which courts generally seem more comfortable, can help tie the new analyses to existing doctrines that have proven themselves workable. Courts should first gather the facts about what constraints both the plaintiff and the defendant faced. These are the *ideas* around which the house had to be built. Both architects may, for example, have been aiming to design a house with a given number of bedrooms, a house with two entryways, or a house with an open floor plan. These general characteristics are ideas and are not protectable. There might also be topological or practical concerns. In *Attia v Society of the New York Hospital*,<sup>201</sup> the defendant was asked to build an extension onto an existing hospital.<sup>202</sup> In that case, the court correctly considered that the task of integrating the new with the old was a constraint the defendant had to fulfill.<sup>203</sup>

This new approach, of course, would not eliminate courts' role in sorting real differences from insubstantial ones. In some cases, a client will have requested that the defendant construct a knockoff of a previous house. A request that is that specific is certainly not an idea. In *Ross*, for example, the client gave the defendant a brochure describing the plaintiff's completed house.<sup>204</sup> Such a brochure is not a mere idea. On the other hand, the client could have requested a triangle-shaped house, in which case the request would have reflected only an idea, which could not belong to the plaintiff. The client could not, however, have provided a full description of the layout of the house, with precise information about the arrangement and sizing of rooms.

The court can then assess the architectural style of the plaintiff's work. This is the *genre* into which the second house had to fit. The central idea of *scènes à faire* is that a copyright

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<sup>200</sup> See Wargo, Note, 65 NYU L Rev at 414–23 (cited in note 3).

<sup>201</sup> 201 F3d 50 (2d Cir 1999).

<sup>202</sup> See *id* at 51–52.

<sup>203</sup> See *id* at 57.

<sup>204</sup> *Ross*, 496 Fed Appx at 316.

owner cannot claim to own a genre. Thus, the defendant *must* be able to build a house of the same architectural style.

The court is then left with a factual question: If an architect were to set out to build a house using the *ideas* (constraints) common to both plans, and in the same *genre* (architectural style), but without having seen either work, what would that third design have in common with either the plaintiff's or the defendant's design? Call the plaintiff's design House A, the defendant's design House B, and the third hypothetical design House C. Is there some respect in which House C differs from House A but House B does not? In other words, does House B have more in common with House A than House C does? If so, there is likely infringement. Essentially, the fact finder would focus—as copyright doctrine already requires—on the similarities between the plaintiff's design and the defendant's, not on the differences. Those similarities that can be attributed to the ideas and style on which both houses were based, or on the marketable features both designs aimed to provide, cannot be the basis for infringement and must be ignored in the similarity analysis.

The true crux of the issue is what degree of freedom subsequent architects require. If the only way they can explore the same ideas as House A in the same style is to *build the same house*, then they should be permitted to do so. If, on the other hand, they can explore those same ideas while still departing from the design of House A, then they should be required to make that departure. Just as an author can own copyright in James Bond but not all spies, the *Intervest* plaintiff should have been permitted to own its layout without owning all four-bedroom colonial houses. The architect of House C, in attempting to build a four-bedroom house with the same general footprint, with a central kitchen, and in a colonial style, without ever seeing the designs at issue in *Intervest*, would not end up designing something so incredibly similar as the houses in *Intervest*. For that reason, *Intervest* should have been a case of liability.

The defendant, in order to escape liability, should have to explain each similarity between the two houses in terms of an idea or a *scène à faire* that belonged to everyone, instead of simply pointing to the differences between the two designs. The plaintiff would point out these similarities in her complaint: for example, the shape of the entryway and the pillared façade with symmetrically positioned windows. The defendant would then



have to explain away each similarity: the façade is a fundamental characteristic of all Georgian homes, and the shape of the entryway is a basic rectangle belonging to the public domain. In order to demonstrate the extent to which these elements did not lie within the plaintiff's copyright, the defendant could hire an expert witness—a third architect—to design House C, a house not based on either the plaintiff's or the defendant's plans, but rather based on the fundamental characteristics of both homes: a four-bedroom, two-story, 2,500-square-foot Georgian house with an open floor plan and a downstairs office. The extent to which this new design resembled neither of the preexisting ones would demonstrate to what extent the defendant's work was lifted from the plaintiff's and to what extent it was developed from elements in the public domain. While the basic features—the ideas—of the house are not protected, its precise footprint, and the arrangement of rooms within it, is. Of course, these aspects are protectable only in concrete form, not when expressed as ideas. In this way, the idea of having a semicircular home overlooking the sea would not be protectable, but the specifics of a given design—how the architect combines and intertwines curved lines with straight ones, how the rooms are laid out to ensure that each has a view—might well be. The aspects are also protectable only insofar as they are original. For example, the layout of four rooms as four equal squares would not be protectable because the idea of laying out rooms in a square formation is too standard to be protectable. On the other hand, a great architect who developed an innovative architectural style, as Frank Lloyd Wright pioneered the style now known as the Prairie School,<sup>205</sup> could claim protection for the style as a whole.

A court struggling to differentiate ideas from expressions in the context of architecture can turn to the established practices of the industry itself. Companies that sell house plans also frequently offer customized modifications to these plans.<sup>206</sup> These modifications are priced to reflect the significance of the changes involved. Very minor changes, sometimes called redlining the blueprint, are those that can be made by hand to the plans

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<sup>205</sup> See generally H. Allen Brooks, *The Prairie School: Frank Lloyd Wright and His Midwest Contemporaries* (Toronto 1972).

<sup>206</sup> See, for example, *Houseplans Custom Plan Modification Guide* (Houseplans LLC), archived at <http://perma.cc/3BR3-Y4Z6> (describing the modification options and corresponding pricing levels offered by one large house-plan company); *Plan Information* (Design Depot, Inc), archived at <http://perma.cc/4H2A-SHXU>; *Modifications* (James Zirkel Home Design Services), archived at <http://perma.cc/PTE7-U9SZ>.

themselves.<sup>207</sup> For example, a client might wish to move a wall a few feet in one direction, or might wish to add or omit a window. More significant changes, on the other hand, involve a substantial redrafting of the plans. These require the computerized designs, often known as CAD files, of the house plan, and they often cost more than the original plans themselves.<sup>208</sup> These more significant alterations might consist of adding a room or rearranging the existing rooms within a floor plan. Many home-plan companies provide a kind of menu of these available services, with different kinds of alterations divided into categories according to the amount and extent of the design and engineering involved.

Courts can use these well-established categories in assessing the similarity between home plans. If the changes required to morph the plaintiff's design into the defendant's design are minor alterations that would cost only a few hundred dollars, they are clearly not enough to escape a finding of infringement—the value added in the defendant's design is negligible compared to the value of the first. On the other hand, if the defendant's design involved more significant alterations, those might well exceed the value of the original design. This would then demonstrate that the defendant's contribution was so significant that she could have created her own design from scratch and still had a marketable product. In order for copyright to avoid tying up too much of the field, the protection accorded to a design should be tied to the added value that the first design provides. If subsequent authors or architects can provide novel interpretations of the same *scènes à faire*, involving alterations that are truly significant in terms of both time and value added, then those interpretations themselves merit protection.

Previous commentators have argued that, because most architecture is made for hire and because most architects recoup the full cost of the design the first time the work is built, the need for copyright protection to encourage architects to build is limited.<sup>209</sup> While this argument might apply well to cases like *Shine*, *Gaito*, and *Attia*, in which the designs at issue were large-

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<sup>207</sup> See *Houseplans Custom Plan Modification Guide* (cited in note 206) (offering redlining for \$100 to \$200 plus the cost of the original blueprint); *Modifications* (cited in note 206) (describing the distinction between redlining and more extensive changes requiring reproducible plans).

<sup>208</sup> See *Plan Information* (cited in note 206) (describing the kinds of modifications that might require a CAD file).

<sup>209</sup> See Su, Note, 101 Nw U L Rev at 1856 (cited in note 7).

scale projects designed for specific buyers, it does not apply to the more typical case, like *Intervest, Zalewski v Cicero Builder Dev, Inc*,<sup>210</sup> or *Precision Craft Log Structures, Inc v Cabin Kit Co*,<sup>211</sup> in which the plaintiff is a company specializing in pre-designed home plans. The crucial difference is whether the architect involved aimed to recoup the entire cost of production in one sale (as in large-scale projects) or to divide it among multiple sales of the same design. House-plan companies seem to base their business model on the hope of getting multiple buyers for each plan in order to recoup the costs of the initial design,<sup>212</sup> so the importance of granting them adequate protection may be greater. Thus, insofar as courts accord more protection to larger architectural projects than to ordinary family homes, this tendency is the reverse of what the economic factors at play should encourage.

Still, courts should resist the possible temptation to simply compare the value of the plaintiff's design with the value of the defendant's modifications and to find infringement only if the price of the modifications was less than the price for the first design. The monetary inquiry should be a factor in the analysis, but courts should avoid reducing questions of artistic contributions to an architect's hourly rates. While these dollar values can be illustrative, they could, if taken too far, also perpetuate the current problems with the interpretation of the AWCPA. A more expensive home design should not receive more protection than a less expensive one. Instead, courts should use the price points as a means to inquire into whether the modifications represented true expression in and of themselves, or whether they were instead mere efforts to skirt the law and avoid infringement. To do this, a court should focus specifically on the cost of the *architectural* alterations that the defendant added, without being distracted by the increased cost of the materials or construction. Courts should compare the cost of altering the plaintiff's plans to create the defendant's plans with the cost of drafting the defendant's plans from scratch. As the next Section explores, minor modifications to plans are often an intrinsic part of construction;

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<sup>210</sup> 754 F3d 95 (2d Cir 2014).

<sup>211</sup> 2007 WL 1412502 (D Idaho).

<sup>212</sup> See, for example, *Online House Design Modifications and Home Plan Customizations* (The House Designers), archived at <http://perma.cc/A4TV-GVTZ> (noting that, out of "[s]everal hundred thousand homes" the company has built, "[a] significant percentage of these were custom homes built from the very same stock plan designs shown on this website").

changes that necessarily result from converting a work from one medium (a blueprint) to another (a physical structure) should not be enough to escape infringement. For this reason, courts should analyze the differences between the plaintiff's plans and the defendant's plans *as built*, but should also include in the analysis the defendant's original preconstruction plans and, if available, the plaintiff's as-built plans.

#### B. How Existing Tests Fail to Provide Appropriate Protection

There are a number of modes of analysis by which courts treat the fact that the plaintiff's work and the defendant's are of the same architectural style. This Section delineates a few of these modes and explores their implications.

1. Treating works as compilations with thin protection fails to grant them any meaningful protection.

In treating architectural works as compilations whenever they fall within an existing architectural style, courts evade the AWCPA and potentially threaten a well-established market in semicustom home construction. The best example of this method of analysis is found in *Intervest*. There, the court said:

[T]he compiler's choices as to selection[,] coordination, or arrangement are the only portions of a compilation, or here, architectural work, that are even entitled to copyright protection. Accordingly, any similarity comparison of the works at issue here must be accomplished at the level of protected expression—that is, the *arrangement* and *coordination* of those common elements.<sup>213</sup>

In a similar vein, some defendants have argued that, because works that adhere to established styles are compilations, they cannot even meet the originality requirement.<sup>214</sup> This argument derives from the holding in *Feist* that the plaintiff's phone book, because it was a compilation of facts and its arrangement and selection involved no creativity, did not merit copyright protection.<sup>215</sup>

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<sup>213</sup> *Intervest*, 554 F3d at 919 (citation omitted).

<sup>214</sup> See, for example, *Lindal Cedar Homes, Inc v Ireland*, 2004 WL 2066742, \*2 (D Or); *Shine*, 382 F Supp 2d at 609–10.

<sup>215</sup> See *Feist*, 499 US at 362.

Whether courts adhere to the *Intervest* holding that architectural works of preexisting styles are compilations<sup>216</sup> or the *Zalewski* holding that, while not compilations, these works receive only thin protection,<sup>217</sup> the result is the same. Either approach nearly erases the architect's copyright interest. If the defendant deviates even slightly from the plaintiff's design, the court finds no substantial similarity. This is a problem for multiple reasons.

First, copyright should not have a perfectly clear test for substantial similarity. Providing such a clear road map to evasion invites infringers to copy designs, change just a little bit, and get off scot-free. Existing tests for substantial similarity aim to avoid this outcome by leaving the precise contours of the determination unwritten and providing judges with some discretion. As Judge Henry Friendly famously noted, "The test for infringement of a copyright is of necessity vague."<sup>218</sup>

Second, particularly in the context of home building, minor changes in the construction of a home are very common.<sup>219</sup> A customer might request minor changes such as the substitution of French doors for sliding doors or the addition of a bonus room above the garage, as in *Intervest*,<sup>220</sup> or builders may make minor errors that result in a wall being placed in a slightly different position.<sup>221</sup> In fact, almost all fully constructed homes differ from their building plans in a few ways. In some cases, developers advertise this potential customization in selling planned or partially constructed homes. Other times, minor changes are made during construction to respond to changing circumstances or to compensate for minor errors.<sup>222</sup> Of course, in *Intervest*, the court compared the two plans, not the fully constructed buildings, so the only differences that were considered by the court were those that were planned ahead, likely those requested by the client, not errors made during the course of construction.

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<sup>216</sup> See *Intervest*, 554 F3d at 921.

<sup>217</sup> See *Zalewski*, 754 F3d at 104.

<sup>218</sup> *Peter Pan Fabrics, Inc v Martin Weiner Corp*, 274 F2d 487, 489 (2d Cir 1960).

<sup>219</sup> See *Online House Design Modifications* (cited in note 212).

<sup>220</sup> See *Intervest*, 554 F3d at 917.

<sup>221</sup> See *Plante v Jacobs*, 103 NW2d 296, 297–98 (Wis 1960).

<sup>222</sup> Unplanned diversions from the written blueprints are so common that many architects offer a service providing "as-built drawings" or "record drawings," which are blueprints prepared after the construction of a building to reflect any discrepancies between the planned blueprints and the final structure. See *Terminology: As-Built Drawings, Record Drawings, Measured Drawings* \*1 (AIA, June 2007), archived at <http://perma.cc/69UZ-ZJR4>.

In building a predesigned house for a client, even the developer who owned the plans would likely make minor adjustments according to the client's wishes. Those adjustments would be reflected in a customized building plan, and so those could be enough for an infringer to escape liability under the *Interinvest* test. If those minor adjustments are simply an inevitable part of turning a predesigned plan into a plan for a given customer, such that the client still saves money by starting out with the preexisting plan rather than an altogether-new plan, they should not be enough for a defendant to escape liability. Instead, the plan with the adjustments should be considered a derivative work.<sup>223</sup>

Additionally, a defendant can currently argue that, even if her initial plans were substantially similar, her final product—her as-built plans—was not, due to unplanned changes made during construction.<sup>224</sup> A defendant could thus possibly escape liability, even though the changes were not an expression of legitimate creativity or evidence of her own artistic contribution but rather an inevitable part of building a home. It is also possible that some plaintiffs may plead infringement based on not the plans of the house but the house itself. This appears to have occurred in *Ross*.

Taken to an extreme, under this test, even a house that an architect built using her own plans might be found not to be substantially similar to or a derivative work of those plans, due to minor variations introduced during planning, customization, or construction. Thus, the emphasis *Interinvest* and *Zalewski* placed on minor modifications further reduces the possibility that a copyright owner could ever succeed on a claim against an infringer.

Based on the nature of the home-design business, a client interested in a copyrighted design is likely to have a number of options. Many designs are commercially available, so a potential buyer could contact the architect and ask to purchase the home plan. If the blueprints are prohibitively expensive, the client

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<sup>223</sup> The Copyright Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” 17 USC § 101.

<sup>224</sup> While copied plans can be the basis for infringement, so can the constructed project. Depending on how the plaintiff pleads infringement, a court's analysis may focus on either the defendant's plans or the final construction. In order to avoid the possibility for this kind of evasion, however, courts should look to both.

could search out a similar design from a different architect.<sup>225</sup> Alternatively, an architect could take inspiration from an existing design and make significant alterations—so long as the architect uses the *ideas* embodied in the design rather than the specifics of the design itself, this would not be infringement. An architect unsure of what this meant could turn to her own experience and the standards of her profession to ensure that the majority of her work consists of major changes to the design of the home rather than mere redlining. Given this plethora of options, the solution proposed by this Comment leaves substantial room for market participants to seek the outcome they desire without destroying the economic value of other architects' existing works. For an architect, her design is a part of her livelihood and can be sold (hopefully multiple times). To the architecture community as a whole, however, each new design also adds to the body of knowledge and the sum total of all designs that have yet been created. Copyright law must protect both aims, allowing the architect to recoup her design expenses and also allowing future architects to build on the same ideas in developing their own original designs. These goals are, to some extent, in conflict, and erring in either direction can destroy the market.

2. Treating established styles as ideas may work well for large-scale architectural projects.

Despite the challenges courts have encountered in applying the AWCPA to home designs, they seem far more comfortable in the context of large-scale architectural projects. These are projects for which the architect is paid the entire cost of production in one sale. The resale value of a skyscraper blueprint or apartment building design is limited, so the designer would undertake these larger projects only on the understanding that the design fees from the project would adequately compensate her without the necessity for any subsequent resales. In these cases, courts seem quite adept at assessing whether the overlap between two designs is significant enough to rise to the level of infringement. As discussed above, this creates a paradoxical legal

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<sup>225</sup> Homeplans.com, for example, provides a repository of over twenty-eight thousand plans. The website includes search functionalities that permit users to specify the number of bedrooms, bathrooms, garage bays, and floors, in addition to the architectural style and the square footage. See *Search Home Plans* (HanleyWood, LLC, 2014), archived at <http://perma.cc/FKD6-492F>. These search functions are classic examples of the noncopyrightable ideas that underlie architectural designs.

landscape in which the creators granted the most protection are those who, in economic terms, need that protection least.

In *Gaito*, the court described an architectural style that is “light, airy, transparent, made of glass with hints of traditional materials” as an uncopyrightable idea.<sup>226</sup> The conclusion that the *Gaito* designs were not substantially similar is obviously correct—while the plaintiffs designed a plan involving three structures, the defendants created a single forty-two-story building, with residential and retail uses.<sup>227</sup> While these facts make this an easier case, the court’s approach to the case is still instructive.<sup>228</sup> It is difficult to imagine that a plan that mirrored the layout of the plaintiffs’ plan almost exactly, like in *Intervest* or *Zalewski*, would be found not to be substantially similar under this analysis as well.

Another case that can help illustrate this approach is *Attia*. There, the court held that the similarities the plaintiff alleged—including a truss structure, the “integration of the new structure with the pre-existing buildings,” and the “insertion of a connecting roadway”—were mere ideas, and, because the actual expression of those ideas in the defendants’ plan differed from that in the plaintiff’s, there was no infringement.<sup>229</sup> Again, the court focused on the similarities, not the differences, along with the question of true creative ownership, asking the appropriate question: Of the similarities between the works, what belongs to the plaintiff and what belongs to the public domain?

### C. Support in the Statute and Legislative History

One major advantage of the approach proposed by this Comment is that it provides a framework within which courts can treat architectural works in much the same way as they treat other works. In the Berne Convention, as well as in the AWCPA itself and its legislative history, there exists a great deal of support for the requirement that architectural work receive the same treatment as other works.

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<sup>226</sup> *Gaito*, 602 F3d at 68.

<sup>227</sup> See *id.* at 67.

<sup>228</sup> See Part II.A.2. The *Gaito* court, rather than focusing on the differences between the plans, analyzed the similarities and aimed to assess whether they were evidence of misappropriation or whether they instead found their origins in aspects of both works that belonged in the public domain. See *Gaito*, 602 F3d at 68.

<sup>229</sup> *Attia*, 201 F3d at 55–58.



Additionally, the legislative history supports the idea that, while common building elements like ordinary doors and windows are not protected, the *arrangement* of them is. *Intervest* strips away the latter protection by permitting small changes to overwhelm the fact that the two houses have nearly identical layouts. If a second architect is going to create a house that fulfills the same purpose as an existing design, she must create her own method of assembling the same elements. Permitting her simply to change individual common elements, like replacing sliding doors with French doors, permits her to take an arrangement of elements—a particular expression of the constraints under which the house was built—from the original creator. The AWCPA was passed with the clear purpose of affording architecture the same copyright protection as literature, visual art, and music. When courts avoid putting architectural works on this equal footing and instead treat them as compilations, they create a second class of copyright protection. This end result cuts against the text of the statute, which explicitly added architecture to the same list as literature, music, and visual arts, and the express advice of the House report on the AWCPA that architecture belongs safely within the existing doctrine of copyright.

#### D. Support in Policy Considerations

This approach is also consistent with the policy considerations that underlie all of copyright law. At its heart, as required by the Constitution, copyright aims “[t]o promote the Progress of Science and useful Arts.”<sup>230</sup> It must therefore strike a balance between incentivizing production, which it does by providing content creators with monopoly rights to allow them to recoup their costs of creation, and allowing future creators to build on existing ideas. In a traditional copyrighted work, like a book, the author incurs a large up-front cost in writing the initial manuscript, but the subsequent marginal cost involved in printing each copy (or distributing each PDF) is likely to be very low. In order to compensate for this initial expense, copyright protection allows the author a limited monopoly, so that she may price each copy far above its marginal cost of production and thereby recoup the initial expense.

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<sup>230</sup> US Const Art I, § 8, cl 8.

The law, however, is also concerned with “the progress of science and useful arts” further down the line. Future authors’ initial production costs will increase if they are forced, by the monopoly rights of prior authors, to forge entirely new literary territory. Courts strike this balance by separating ideas—like generic conventions—from expression. While the second author can employ the same ideas as the first, she cannot rehash the first author’s expression.

The policy considerations that underlie all of copyright apply equally well in the context of architecture. Because of the way architectural projects of different sizes are funded, the law should not provide protection to large-scale projects alone. Small-scale projects, which can be built multiple times and customized to a number of locations, actually may need the most protection, because of the way that home-package companies monetize their designs. If family homes of an existing architectural style receive virtually no protection, then companies whose business models rely on their ability to recoup the initial design expenses over multiple construction projects will be forced to compete with other companies who take the original design, make slight changes, and sell it at a price close to the marginal cost of construction. Thus, the company that initially incurred the expense of creating the design will be unable to recoup that cost. Providing it with merely “thin” copyright protection will essentially drive it from the market and deprive customers of the opportunity to purchase well-designed home plans with standard features, instead forcing them to purchase custom plans and pay the entire cost of design.<sup>231</sup>

This proposal also satisfies the concern for future architects and their creative freedom. Even as we allow architects to control the use of their designs, we must allow other architects to compete with them. By asking whether it is possible for a hypothetical architect to fulfill the same purpose and explore the same ideas without using the same methods of expression,

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<sup>231</sup> While it is difficult to gauge whether the current supply of home designs is at or near the optimal level, certain market conditions suggest that there may currently be an undersupply. For instance, many home-plan companies are reluctant to release their plans publicly and instead publicize only photographs or artistic renderings of the house, not the fully detailed plans that might better inform a customer. Others release plans only to customers who have created a login or have officially signed up. See, for example, *FAQ/Help* (HanleyWood, LLC, 2014), archived at <http://perma.cc/4F8Z-GV8L> (“Can I make copies of the plans?” “The plans are copyrighted and not reproducible. Copies can only be made if you order the reproducible print.”).

courts can determine whether the rights they are granting plaintiffs would give them a monopoly on an idea.<sup>232</sup>

This proposal would also serve public policy by permitting architects to share their designs freely, without fear that their ability to monetize their creations might immediately become subject to competition. Before the AWCPA, it may have been the case that architects were even less willing to share their plans than they are at present. Even today, the Frank Lloyd Wright Foundation is extremely secretive about Wright's unbuilt designs—it has to be in order to preserve its property rights in those designs, so that it can maintain control over the use and integrity of those designs.<sup>233</sup> If instead the AWCPA had been enacted before Wright designed those plans, the plans could be displayed in a museum, leaving the Foundation secure in knowing that it could sue someone who copied those plans and adapted them to her land.

If an individual is shopping for an architectural firm to design her home, particularly if she is interested in predesigned plans, it is in her best interest that she be able to view a wide variety of plans before she must bind herself contractually. After cases like *Intervest*, companies that make predesigned house plans may hesitate to publish those plans, even if that advertising would gain them customers, for fear that another company could copy those plans, change some details, and claim a lack of substantial similarity. Protection should be increased without permitting architects to claim property rights in ideas.

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<sup>232</sup> See Part III.A.

<sup>233</sup> In addition to permitting the holder to collect licensing fees, copyright also allows the owner to control how the work is used or produced. For the Frank Lloyd Wright Foundation, this artistic control seems to have been more important than the licensing fees it could collect. The prospect of having unauthorized, and perhaps undiscerning, constructions of Wright's plans was the driving force behind its choice to avoid releasing many of his unbuilt plans. Due to concerns about fidelity to Wright's original vision, the Foundation has discontinued an earlier program that permitted new constructions of unbuilt Wright designs, supervised by carefully selected architects. See James Lambiasi, *The Mitsubishi Ichigokan Reconstruction: History or Illusion?*, 125 *J Architecture & Building Sci* 44, 45 (Jan 2010):

Because the ethical questions of how to authentically reconstruct a historical design posed many obstacles, the Frank Lloyd Wright Foundation decided to discontinue the Legacy Program. Despite the great anticipation to see unrealized works of Wright finally come to fruition, the case of the Legacy Program showed that the absence of Wright as the original architect outweighed this and resulted in its discontinuation.

(citations omitted).

## CONCLUSION

Following the AWCPA, courts have been divided in their treatment of architectural works now subject to copyright protection. While some circuits have held that works of an existing style receive merely “thin” protection, others have analyzed the question of infringement from a more nuanced point of view, comparing the works at issue from a general standpoint. While the latter approach provides architectural works with more protection, it may be difficult to administer and to predict.

This Comment proposes a solution that parallels the treatment of literary genres. By focusing on the question whether a hypothetical third architect could satisfy the functional and marketable constraints of the original design without mimicking its expression, this inquiry ensures that the first architect has adequate incentives to create and that future architects are left with enough freedom to craft their own designs. In this way, this approach stays close to the fundamental policy considerations that form the basis of copyright while also ensuring that judges can administer the test easily and consistently.